IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 18-1209, 18-1210, 20-1507, 20-1508

NORTHSTAR WIRELESS, LLC AND SNR WIRELESS LICENSECO, LLC,

PETITIONERS-APPELLANTS,

V.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

RESPONDENTS-APPELLEES.

ON PETITIONS FOR REVIEW OF AND NOTICES OF APPEAL FROM ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties. The Petitioners-Appellants in this case are Northstar Wireless, LLC, and SNR Wireless LicenseCo, LLC. The Respondents-Appellees are the Federal Communications Commission and the United States of America. DISH Network Corporation is an intervenor in support of Petitioners-Appellants. AT&T Services, Inc., T-Mobile USA, Inc., and VTel Wireless, Inc., are intervenors in support of Respondents-Appellees. The Phoenix Center for Advanced Legal and Economic Public Policy Studies is an amicus for Petitioners-Appellants.

2. Rulings under review. *Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC*, 33 FCC Rcd 7248 (2018) and *Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC*, 35 FCC Rcd 13317 (2020).

3. Related cases. The Orders on review respond to this Court's remand in *SNR Wireless LicenseCo, LLC v. FCC*, 868 F.3d 1021 (D.C. Cir. 2017).

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GLOSSARY

AWS-3	Advanced Wireless Services-3. Spectrum bands at 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz.
AWS-4	Advanced Wireless Services-4. Spectrum bands at 2000-2020 MHz and 2180-2200 MHz.
Bureau	Federal Communications Commission's Wireless Telecommunications Bureau
Commission	Federal Communications Commission
FCC	Federal Communications Commission

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BRIEF FOR RESPONDENTS-APPELLEES

INTRODUCTION

In 2017, this Court upheld the Commission's determination that Northstar Wireless, LLC (Northstar) and SNR Wireless LicenseCo (SNR) (collectively "Petitioners"), two participants in an FCC spectrum auction, were ineligible for $3.3 billion in bidding credits set aside for "very small businesses." The Court agreed with the Commission that Petitioners were not *bona fide* small businesses because under the Commission's rules and precedent, they were controlled by DISH Network Corporation (DISH), a Fortune 500 company that funded Petitioners' winning bids totaling $13.3

billion. *SNR Wireless LicenseCo, LLC v. FCC*, 868 F.3d 1021 (D.C. Cir. 2017). But the Court also found that Petitioners lacked fair notice that the Commission would reach that determination without providing them "an opportunity to cure" their eligibility problems. 868 F.3d at 1045. The Court therefore remanded the case so that the Commission could provide "an opportunity for petitioner[s] to renegotiate their agreements with DISH," which formed the basis for the Commission's control determination. *Id*. at 1046.

On remand, the Commission provided that opportunity. Petitioners submitted revised agreements to the Commission that they contended entitled them to the bidding credits they requested. The Commission engaged in an exhaustive analysis of those agreements, examining the effect of their terms in combination and in the context of Petitioners' overwhelming financial obligations to DISH. Once again, the Commission determined that Petitioners were ineligible for very-small-business bidding credits because they remained under DISH's *de facto* control.

On appeal, Petitioners challenge the procedures that the Commission established for the "cure opportunity" mandated by this Court. They also contest the Commission's determination that they remain under DISH's *de*

facto control, and contend that they lacked fair notice that the Commission would reach that conclusion. As we show, each of these arguments fails.

First, the Commission's procedures comported with this Court's direction on remand and the agency's broad powers to structure its proceedings. Second, the Commission's conclusion that DISH retains *de facto* control over Petitioners is firmly grounded in Petitioners' modified agreements with DISH, is consistent with the agency's earlier analysis of Petitioners' control issues, and is otherwise reasonable. Lastly, Petitioners should have known that the Commission would analyze control based on the totality of the circumstances of their relationships with DISH, such that eliminating just some of problematic terms in the original agreements would not guarantee their eligibility for bidding credits.

JURISDICTION

The FCC's Order setting forth procedures on remand was released on July 12, 2018. *See Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC*, 33 FCC Rcd 7248 (2018) (*Remand Procedures Order*) (JA___). On August 2, 2018, Northstar and SNR filed a petition for review under 47 U.S.C. § 402(a) and a protective notice of appeal pursuant to 47 U.S.C. § 402(b). *See* D.C. Cir. Nos. 18-1209, 1210. The Court held those cases in abeyance pending the Commission's decision on remand.

The FCC's Order on remand was released on November 23, 2020. *See Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC*, 35 FCC Rcd 13317 (2020) (*Remand Order*) (JA___). Northstar and SNR filed a petition for review and a protective notice of appeal of that order on December 18, 2020. *See* D.C. Cir. Nos. 20-1507, 1508. The Court has consolidated all four cases.

Northstar and SNR filed their petitions for review and notices of appeal within 30 days of the release of each Order. Their challenges are therefore timely, whether they are governed by 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1), or 47 U.S.C. § 402(b). Because this Court has jurisdiction either way, it need not resolve whether section 402(a) or (b) applies. Pet. Br. 4; *Cellco P'ship v. FCC*, 700 F.3d 534, 541 (D.C. Cir. 2012).

QUESTIONS PRESENTED

1. Whether the Commission's procedures on remand satisfied this Court's directive to provide Petitioners an opportunity to cure their ineligibility for bidding credits, and are otherwise reasonable?

2. Whether the Commission reasonably concluded that DISH retained *de facto* control of Petitioners?

3. Whether Petitioners had fair notice that the Commission would determine that their renegotiated agreements maintain DISH's *de facto* control?

COUNTERSTATEMENT

I. THE AWARD OF DESIGNATED ENTITY BIDDING CREDITS IN FCC SPECTRUM AUCTIONS

The Communications Act of 1934 authorizes the Commission to award licenses to use electromagnetic spectrum to provide communications services. *See* 47 U.S.C. §§ 307, 309. Since 1993, the Act has required the Commission to award most spectrum licenses "through a system of competitive bidding," *i.e.*, by auction. 47 U.S.C. § 309(j)(1).

Congress directed the Commission to design auction rules that, among other objectives, "advanc[e] economic opportunity and competition by disseminating licenses 'among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women'" without "unjust enrichment of licensees that are not *bona fide* small or unrepresented businesses." *SNR Wireless*, 868 F.3d at 1026 (quoting 47 U.S.C. § 309(j)(3)-(4)).

To encourage participation in spectrum auctions of small businesses and other "designated entities," the Commission offers "bidding credits, *i.e.*, discounts that may be used to cover part of the cost of any licenses those

businesses win." *SNR Wireless*, 868 F.3d at 1026; 47 C.F.R. § 1.2110(a), (f)(1). "FCC regulations specify that bidding credits can only be used by genuine small businesses—not by small sham companies that are managed by or affiliated with big businesses." *SNR Wireless*, 868 F.3d at 1026.

To be eligible for a bidding credit, an applicant must demonstrate that its gross revenues, in combination with those of its "attributable" interest holders, fall below limits that are specific to a particular auction or service. 47 C.F.R. § 1.2110(b)(1)(i). The regulations attribute to an applicant the revenues of certain other entities, including: (1) any entity that manages the operation of an applicant pursuant to a "management agreement" that gives the entity authority to "make decisions" or "engage in practices" that determine, or significantly influence," the "nature or types of services offered by such an applicant," 47 C.F.R. § 1.2110(c)(2)(ii)(H); and (2) any entity with *de facto* or *de jure* control of the applicant, which is deemed an "affiliate." *Id*. § 1.2110(c)(5).

The Commission's auction rules require applicants for bidding credits to certify their eligibility in "short-form applications" filed before the auction. *Id.* § 1.2112(b)(1). Should an applicant win a license, it must submit a more comprehensive "long-form application" after the auction, along with a copy of each agreement "affect[ing]" its "designated entity status," including

"partnership agreements, shareholder agreements," and "management agreements." *Id*. § 1.2110(j).

In evaluating an applicant's claim for bidding credits, the Commission closely examines the totality of the circumstances in each case by employing the factors set forth in its decision in *Intermountain Microwave*, 12 FCC 2d 559 (1963). *See Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 10 FCC Rcd 403, 449-450 (¶ 83) (1994) (*Fifth MO&O*). Under *Intermountain Microwave*, the potential for one entity to control another is evaluated based on six factors:

> (1) unfettered use of licensed facilities and equipment; (2) day-to-day operation and control; (3) determination of and carrying out of policy decisions; (4) employment, supervision, and dismissal of personnel; (5) payment of financial obligations; and (6) receipt of profits from operation of the licensed facilities.

Id. (summarizing *Intermountain Microwave*, 12 FCC 2d at 560). "[A] totality analysis does not require a finding of control with regard to all *Intermountain Microwave* factors." *Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC*, 30 FCC Rcd 8887, 8911 (n.202) (2015) (*2015 Order*) (JA___).

The Commission has also cautioned licensees that "agreements between designated entities and strategic investors that involve terms (such as management contracts combined with rights of first refusal, loans, puts, *etc*.) that cumulatively are designed financially to force the designated entity into a

sale (or major refinancing) will constitute a transfer of control under our rules." *Fifth MO&O*, 10 FCC Rcd at 456 (¶ 96).

II. AUCTION 97

In May 2014, the FCC announced that it would conduct an auction (Auction 97) to award more than 1,600 licenses in a spectrum band designated for Advanced Wireless Services-3 (AWS-3). The Commission determined that an entity with less than $40 million in attributable revenues could receive a 15 percent bidding credit as a small business, and an entity with less than $15 million in attributable revenues could receive a 25 percent bidding credit as a very small business. *2015 Order* ¶ 13 (JA___).

Petitioners "[had been] formed just in time to file short-form applications for Auction 97: SNR was formed fourteen days and Northstar was formed eight days before the application deadline. As nascent companies, SNR and Northstar lacked officers, directors, and revenues when they each submitted a short-form application." *SNR Wireless*, 868 F.3d at 1027. DISH, a "Fortune 500" company with average annual gross revenues of $13 billion, held an 85 percent interest in each petitioner. *2015 Order* ¶¶ 14, 17 (JA___, ___). A Managing Member (SNR Wireless Management LLC and Northstar Manager LLC) indirectly owned the remaining 15 percent controlling interest in SNR and Northstar, respectively. *Id.*

Auction 97 began on November 13, 2014, and ultimately raised more than $40 billion from 31 winning bidders. SNR was the winning bidder for 357 licenses, with an aggregate gross bid amount of $5,842,364,300. *Id.* ¶ 16 (JA___). Northstar was the winning bidder for 345 licenses, with an aggregate gross bid amount of $7,845,059,400. *Id.* ¶ 19 (JA___).

In their long-form applications, Petitioners claimed that they were entitled to the 25 percent bidding credit available to very small businesses. If awarded, the credits would reduce SNR's net bid amounts by $1,370,591,075 and Northstar's by $1,961,264,850, for a combined discount of more than $3.3 billion. *Id.* ¶¶ 16, 19 (JA___, ___). With their applications, SNR and Northstar submitted numerous agreements with DISH, including management-services agreements, credit agreements, and joint bidding agreements (the "2015 Agreements"), *see id.* ¶ 21 (JA___). Neither company attributed DISH's revenues to its own.

III. THE FCC'S *2015 ORDER* DENYING BIDDING CREDITS

Several entities opposed the grant of bidding credits to Petitioners because of their relationships with DISH. *2015 Order* ¶ 30 (JA___). Based on a comprehensive review of the 2015 Agreements, and the circumstances of their participation in Auction 97, the Commission, by a unanimous vote, denied them bidding credits.

The Commission found that DISH had *de facto* control of Petitioners under the multi-factor analysis laid out in *Intermountain Microwave* and the *Fifth MO&O*.

The Commission determined that the 2015 Agreements afforded DISH "19 wide-ranging" investor protections that "go well beyond" "typical" protections "for a purely financial investor that does not intend to control the day-to-day operations of the company in which it has invested." *Id*. ¶ 63 (JA___); *id*. ¶¶ 59-68 (JA___). The Commission further determined that "DISH controls [Petitioners'] daily operations" through Management Services Agreements that provide DISH, as the Operations Manager, authority over all the "key functions" of a wireless provider. *Id*. ¶ 74 (JA___).

The Commission found that DISH "dominates the financial aspects of [Petitioners'] businesses," *id*. ¶ 84 (JA___), noting that DISH had paid 98 percent of Petitioners' winning bids in Auction 97, and "further agreed to provide all future funds for build-out and working capital." *Id*. Moreover, the Commission found that Petitioners "lack[ed] authority to raise capital" from other sources "without DISH's consent." *Id*. ¶ 85 (JA___). The Commission also found that "any profits that are generated" from the businesses "w[ould] only accrue to DISH" because "SNR and Northstar must first repay … billions of dollars in loans" before "realizing any profits from their business

operations." *Id.* ¶¶ 89, 90 (JA___, ___). Lastly, the Commission concluded that the 2015 Agreements restricted Petitioners' authority to make essential policy decisions related to acquisition of new spectrum licenses, network construction, and disposition of the businesses. *Id.* ¶¶ 94-108 (JA___).

The Commission was particularly concerned that the agreements were "'cumulatively . . . designed to force [Petitioners] into a sale'" to DISH. *Id.* ¶ 105 (JA___) (quoting *Fifth MO&O*, 10 FCC Rcd at 456 (¶ 96)). A "put option" allowed Petitioners to force DISH to buy out their interests before they had to repay their multi-billion-dollar loans—but only during a 30-day window at the end of the fifth year of the license term. *Id.* ¶¶ 102-105 (JA___). This timing coincided exactly with the "unjust enrichment" restriction in the Commission rules, under which Petitioners could sell their licenses to a company that is not a designated entity without having to repay their bidding credits only after five years. 47 C.F.R. § 1.2111(b) (2014).

IV. THIS COURT'S REMAND DECISION

Petitioners sought review by this Court. In a unanimous decision, the Court upheld the Commission's determination that Petitioners were ineligible for very-small-business bidding credits because they were controlled by DISH. *SNR Wireless*, 868 F.3d at 1029-1035. The Court nevertheless held that Petitioners lacked fair notice that in the event the Commission found *de*

facto control, it would deny them an opportunity to cure that problem. The Court therefore remanded the proceedings so that Petitioners could seek to cure. *Id*. at 1043-46.

1. The Court concluded that the Commission's application of the six *Intermountain Microwave* factors was "reasonable and consistent with existing law." *Id*. at 1034; *id*. at 1030-34.

First, the Court held that the Commission had reasonably "found that DISH had control over [Petitioners'] daily operations," based on the Commission's detailed findings regarding the Management Services Agreements. *Id*. at 1031.

Second, the Court held that the Commission had reasonably "determin[ed] that [Petitioners] had little control over their employment decisions," noting that the nominal rights they had to hire employees were "illusory" given severe, built-in budgetary limitations. *Id*. at 1031-32.

Third, the Court deferred to the Commission's finding that "[Petitioners] did not have 'unfettered access to their facilities and equipment,'" noting that the 2015 Agreements "barred [Petitioners] from using their facilities to provide any service that was incompatible with DISH's service," even though DISH had not "specified the service it planned to develop." *Id*. at 1032.

Fourth, the Court held that the Commission had reasonably found that DISH "'dominate[d] the financial aspects of [Petitioners'] businesses.'" *Id.* The Court quoted the Commission's finding that "DISH 'provided equity contributions and loans to the [Petitioners'] winning bid amounts and … further agreed to provide all future funds for build-out and working capital.'" The Court also observed that Petitioners "could not acquire more than $25 million in debt from sources other than DISH"—a sum that the agency deemed "'trivial' in comparison to what it would cost to build and use a nationwide wireless network." *Id.* (quoting *2015 Order* ¶ 85 (JA___)).

Fifth, the Court affirmed the Commission's finding that the "allocation of profits from [Petitioners'] business 'firmly raise[d] the specter of control,'" agreeing with the Commission's assessment that the "extensive construction" the companies "would need to undertake" before "providing wireless service" made it "very unlikely" they would "be able to repay the[ir] loans and begin earning profits." *Id.* at 1033 (quoting *2015 Order* ¶ 89 (JA___)).

Sixth, the Court held that the Commission reasonably "concluded that DISH made every essential policy decision for [Petitioners'] businesses, including decisions about … the timetable for [Petitioners] to build networks and begin offering service to customers"; "when [Petitioners] might sell their businesses"; and "[Petitioners'] bidding strategy." *Id.* at 1033.

The Court accordingly held that "the FCC reasonably concluded that DISH effectively controlled [Petitioners'] businesses" under the *Intermountain Microwave* factors. *Id*.

2. The Court separately "conclude[d] that the *Fifth MO&O* clearly presaged the FCC's *de facto* control finding, and that the Commission applied the *Fifth MO&O* in a reasonable manner." *Id*. at 1034; *see id*. at 1034-35. In doing so, the Court relied on an example provided in the *Fifth MO&O*, which explained that the Commission might find *de facto* control where an "investor makes debt financing available to the applicant on very favorable terms," and "the designated entity has a one-time put right that is exercisable at a time and under conditions that are designed to maximize the incentive of the licensee to sell." *Id*. at 1035. The Court found the example to be "materially identical to the facts" here, observing that Petitioners "would be unlikely to be able to build a wireless network and generate enough revenue to repay their multi-billion-dollar loans to DISH" in the time specified by the 2015 Agreements. *Id*. at 1034. The agreements thus "left [Petitioners] one path to avoiding certain financial failure": to exercise their put options during the 30-day window at the end of the fifth year. *Id*.

3. Petitioners contended that, "even if the FCC reasonably applied its precedent regarding *de facto* control, those precedents did not give them fair

notice" either (1) that their arrangements "might be found to [] manifest *de facto* control" or (2) that, if *de facto* control were found, Petitioners would have no opportunity to cure that problem. *Id*. at 1043.

The Court held that Petitioners had "sufficiently clear" notice about the control test the Commission would apply, and that, "[o]n these facts, for all the reasons set forth" in the Court's analysis of the merits, "petitioners should reasonably have anticipated that the FCC might find them to be under DISH's *de facto* control." *Id*. at 1044.

However, the Court agreed with Petitioners that each "lacked reasonable notice that, in the event it found *de facto* control, the Commission would deny them an opportunity to cure" that problem. *Id*. The Court found support for Petitioners' argument in a decision of the Commission's Wireless Telecommunications Bureau (Bureau) that had allowed a designated entity to transfer its licenses to a subsidiary, over the objection of another party, "subject to modifications negotiated to eliminate [an] investor's *de facto* control" of the subsidiary. *Id*. at 1045-46 (noting later citation by the Commission, "in an appendix to a final rule," to *ClearComm, L.P.*, 16 FCC Rcd 18627 (WTB 2001) (*ClearComm*)). The Court "conclude[d] that an opportunity for petitioner[s] to renegotiate their agreements with DISH

provides the appropriate remedy here," and remanded the case to the Commission to provide that opportunity. *Id*.

V. THE REMAND PROCEEDING

A. The *Remand Procedures Order*

On remand, the Bureau created a process by which Petitioners would receive an opportunity to eliminate DISH's control over them. *Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC*, 33 FCC Rcd 231 (WTB 2018) (JA___). The Bureau provided a 90-day window for Petitioners to "renegotiate their respective agreements with DISH" and to submit documentation demonstrating their eligibility for very-small-business bidding credits. 33 FCC Rcd at 232 (¶ 5) (JA___). Any new or amended agreements filed in support of their bidding credit applications would be made available for comment by the parties of record; Petitioners could then elect to amend their agreements in response to those comments; and parties of record could submit comments on the amendments, if any. *Id.* at 233-234 (¶¶ 7-8) (JA___). The Commission would then determine whether Petitioners were eligible for bidding credits based on the record before it. *Id.* at 234 (¶ 9) (JA___).

Petitioners filed an application for review of that order to the Commission, asserting that the opportunity to cure mandated by this Court's remand decision entitled them to an "iterative" process of negotiation with

Commission staff. Joint Application for Review of Northstar Wireless, LLC, SNR Wireless LicenseCo, LLC, ULS File Nos. 0006670613 and 0006670667 (Feb. 21, 2018) at 1 (JA___). On review, the Commission rejected those arguments and affirmed the Bureau's remand procedures.

The Commission determined that, in remanding the matter, the Court did not require Commission staff to engage in "responsive, back-and-forth discussions" with Petitioners. In coming to this conclusion, the Commission emphasized the Court's statement "that an opportunity for petitioner[s] to *renegotiate their agreements with DISH* provides the appropriate remedy here." *Remand Procedures Order* ¶ 11 (JA___) (quoting *SNR Wireless*, 868 F.3d at 1046) (emphasis added); *id.* ("[Petitioners] are to negotiate with DISH and not with the Commission.") The Commission further explained that "nothing in the mandate prescribes what form [the opportunity to cure] must take, much less compels the cycle of 'iterative negotiations'" demanded by Petitioners. *Id*. ¶ 12 (JA___). For that reason, the Commission found that the Court did not limit the Commission's discretion under section 4(j) of the Act to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." *Id.* ¶ 15 (JA___); 47 U.S.C. § 154(j).

The Commission also rejected Petitioners' argument that the remand procedures departed from the Commission's own precedent—specifically, the Bureau's *ClearComm* decision. The Commission determined that even if *ClearComm* required the Commission to provide Petitioners guidance about their control problems, and how to resolve them, the Commission had satisfied that obligation by presenting its "views on the ways in which [Petitioners'] initial applications were defective" in the *2015 Order*. *Id.* ¶ 20 (JA___).

B. The *Remand Order*

Petitioners' submitted new license applications, supported by new agreements with DISH (the "2018 Agreements") and pleadings in support of their applications. Intervenors VTel Wireless and T-Mobile filed comments questioning Petitioners' eligibility for very-small-business bidding credits. *Remand Order* ¶ 34 (JA___). Petitioners and DISH opted not to make further changes to their agreements in response. *Id*. ¶ 35 (JA___).

After an extensive review of the record, the Commission concluded that DISH retained *de facto* control of Petitioners.

1. The *Intermountain Microwave* Factors

The Commission acknowledged at the outset that Petitioners had made several changes in the 2018 Agreements, including eliminating the

Management Services Agreements and the requirement that their technology be interoperable with DISH's. The Commission found that these changes meant that two of the *Intermountain Microwave* factors—control of employment decisions and use of facilities and equipment—no longer weighed in favor of DISH's control. *Remand Order* ¶¶ 79, 123 (JA ___, ___). But while Petitioners' modifications eliminated "some of" the Commission's "prior … concerns," they did not change its "bottom-line conclusion" that DISH retained control over Petitioners in light of the remaining four of the six *Intermountain Microwave* factors. *Id*. ¶ 63 & n.141 (JA ___).

*Investor Protection*s. The 2018 Agreements included six investor protections—two of which, the Commission found, "reinforce DISH's control." *Id*. ¶ 69 (JA___). First, DISH retains the ability to veto, at its sole discretion, any attempt by Petitioners to incur "significant" unsecured indebtedness, or to use assets as security for "significant" indebtedness, thus providing DISH the power to prevent Petitioners from acquiring third-party financing for the billions of dollars needed to construct and operate wireless networks. *Id*. ¶ 70 (JA___). Second, while the 2015 Agreements only provided DISH the right to veto the sale of Petitioners' "property and assets," the 2018 Agreements extended that right to the transfer, exchange, lease, mortgage, pledge, or assignment of any "major asset," including their

spectrum licenses. The Commission determined that this expanded right is a "critical new index of DISH's *de facto* control," because it constrains Petitioners' ability to raise revenue without constructing capital-intensive wireless networks. *Id*. ¶ 71 (JA___).

Control Over Daily Operations. Responding to the Commission's concerns in the *2015 Order*, Petitioners also terminated their Management Services Agreements with DISH, and negotiated the right to amend their five-year business plans without consulting with DISH. But that latter right contained an important caveat—it could only be exercised if there are "material changes affecting" Petitioners' businesses. The Commission found that this caveat blunted the effect of removing DISH's consultation right, because absent a "material change"—which Petitioners have the burden to prove—the two companies "remain locked in to the business plans prepared during DISH's *de facto* control." *Id*. ¶ 75 (JA___).

Responsibility for Financial Aspects of the Business. On remand, the parties also renegotiated the nature of Petitioners' financial obligations to DISH. The 2018 Agreements converted the majority of Northstar's debt ($7 billion) and SNR's debt ($5 billion) to DISH into preferred equity, leaving each company with $500 million of debt to DISH, plus interest, in addition to the interest on the original loan amounts that accrued before they were

restructured. Under the 2018 Agreements, Petitioners also must now make quarterly dividend payments that if missed, accumulate as additional preferred equity for DISH. *Id.* ¶ 81 (JA___).

The modifications to Petitioners' financial obligations to DISH did not change the Commission's determination that DISH retains significant leverage over them. The Commission explained that "while the [Petitioners] have negotiated changes as to the form of their debt to DISH, the sheer quantity of their financial obligations remains the same." *Id.* ¶ 82 (JA___). And because DISH "has been and remains the primary source of [Petitioners'] capital," the companies' dependence on DISH will grow if they borrow more money from DISH to build-out their licenses. *Id.* ¶ 83. (JA___).

Receipt of Monies and Profit. The Commission also concluded that "the parties have changed the form but not the controlling nature of DISH's financial interests with respect to the receipt of monies and profits." *Id.* ¶ 98 (JA___). In addition to Petitioners' "overwhelming financial obligation" to DISH, *id.* ¶ 99 (JA___), the Commission observed that DISH could use its power to control the companies' use of their spectrum to stymie their ability to make their quarterly dividend payments. *Id.* ¶ 102 (JA___). Should Petitioners miss a cash dividend payment, DISH will be compensated in preferred equity; as DISH's preferred equity grows, the value of Petitioners'

common equity is diluted, which reduces (or could eliminate) the companies' future rights to profits upon sale or dissolution of the businesses. *Id.* ¶ 100 (JA___). The Commission therefore concluded that "any profits of [Petitioners] operations are still … 'only likely to benefit DISH.'" *Id.* ¶ 103 (JA___) (quoting *2015 Order* ¶ 88 (JA___)).

Control of Policy Decisions. The 2018 Agreements removed several restrictions on Petitioners' ability to make policy decisions that the Commission found problematic in the *2015 Order*. *Remand Order* ¶ 107 (JA___). "Notwithstanding these modifications," the Commission concluded that DISH continues to control the "most fundamental policy decisions identified by" it and this Court. *Id.* ¶ 108 (JA___).

First, "because DISH can determine whether, to what extent, and from whom, the [Petitioners] can raise additional 'significant' unsecured funding," the Commission found that DISH "also can continue to exercise control over whether the [Petitioners] can use" their licenses to "build and operate nationwide wireless networks." *Id.* ¶ 109 (JA___).

Second, "DISH now has—for the first time—a unilateral veto over any 'lease' by the [Petitioners] of any major asset" (including spectrum licenses), which the Commission found "further limits the [Petitioners'] 'range of business options.'" *Id.* ¶ 110 (JA___) (quoting *2015 Order* ¶ 98 (JA___)).

Third, the Commission determined that the 2018 Agreements "still give DISH the ability … to influence if, how, when, and under what circumstances" Petitioners can exit the business. *Id.* ¶ 111 (JA___). For example, the Managing Members of both companies are prohibited from transferring their interests to any DISH competitor. That prohibition greatly shrinks (and may as a practical matter even eliminate) the pool of potential buyers, because other wireless services providers are the entities that would be most interested in acquiring Petitioners' licenses. *Id.* ¶ 135 (JA___).

Fourth, the Commission determined that, notwithstanding material differences between Petitioners, "dozens of pages of virtually identical" terms in the 2018 Agreements "provide[d] persuasive additional evidence" that they are "serving as 'arms of DISH.'" *Id.* ¶ 115 (JA___).

The Commission concluded that "[t]aken together, these restrictions continue to demonstrate a pattern of substantial DISH control over the locus of the [Petitioners'] policy decisions." *Id.* ¶ 120 (JA___).

2. The *Fifth MO&O*

The Commission separately held that the 2018 Agreements maintained DISH's *de facto* control under the guidance set forth in the *Fifth MO&O*. *Remand Order* ¶ 124 (JA___); *id.* ¶¶ 124-146 (JA___).

This Court found that the terms of the 2015 Agreements left Petitioners "only one path to avoiding certain financial failure"—a put right to require DISH to buy their business during a "30-day window at the end of the fifth year." *SNR Wireless*, 868 F.3d at 1034. The 2018 Agreements expanded that window from 30 to 90 days, and provided for a second window in year six. *Remand Order* ¶ 128 (JA___).

The Commission concluded that even with those changes, the put rights "are not materially different" from those in the 2015 Agreements. *Id.* ¶ 129 (JA___); *SNR Wireless*, 868 F.3d at 1034-35. "[B]y exercising either the year-five or year-six put options," the Commission explained, the Petitioners "receive healthy, above-market returns even if they have not constructed networks or repaid their loans (*i.e.*, with virtually zero risk)." *Id.* ¶ 130 (JA___). If they do not, the two companies will be required to pay their outstanding obligations to DISH. *Id.* ¶ 133 (JA___). Because the 2018 put rights still appear to be "designed to maximize the incentive of the [Petitioners] to sell,'" the Commission concluded that they continue to provide evidence of a transfer *de facto* control from Petitioners to DISH. *Id.* ¶ 136 (JA___) (quoting *SNR Wireless*, 868 F.3d at 1035).

SUMMARY OF ARGUMENT

In the *Remand Procedures Order*, the Commission provided Petitioners an opportunity to cure the *de facto* control problems identified by the Commission in the *2015 Order* and this Court in the *SNR Wireless* decision. In the *Remand Order*, the Commission evaluated the 2018 Agreements under its control rules and precedent, and reasonably concluded that DISH has retained its *de facto* control of Petitioners.

1. Petitioners contend that they were deprived of the opportunity to cure mandated by this Court because the Commission did not allow them to engage in back-and-forth negotiations with Commission staff over amendments to their agreements with DISH that would lead the Commission to deem them eligible for bidding credits. But the Court did not require any such thing. Instead, the Court directed the Commission to provide an opportunity for Petitioners "to renegotiate their agreements with *DISH*," not the Commission. *SNR Wireless*, 868 F.3d at 1046 (emphasis added).

The Commission has broad discretion to establish remand procedures. *See, e.g.*, 47 U.S.C. § 154(j). It reasonably exercised that discretion by giving Petitioners an opportunity to renegotiate their agreements with DISH, in light of the Commission's (and this Court's) prior analysis of the 2015

Agreements, and to amend them a second time in response to comments from the parties of record.

Petitioners contend that in *ClearComm* and other cases, Commission staff engaged in back-and-forth discussions with other parties over how to cure control issues that affected their designated entity eligibility. But unlike the parties in those cases, Petitioners have the benefit of a lengthy Commission order and a Court decision explaining in detail why the terms in their agreements with DISH supported a finding of *de facto* control. Given the guidance that this Court and the Commission have already provided Petitioners, the Commission's remand procedures were reasonable.

2. Employing its totality-of-the-circumstances test for evaluating control—which this Court upheld in *SNR Wireless*—the Commission reasonably concluded that DISH retained *de facto* control of Petitioners under the 2018 Agreements. First, the 2018 Agreements gave DISH the right to veto any effort by Petitioners to lease their spectrum licenses to any meaningful extent, if not completely. That restriction, in conjunction with other restrictions retained in the 2018 Agreements, vested DISH with the power to foreclose Petitioners' ability to generate revenues, and consequently, to pay off their enormous (and likely growing) debts to DISH and earn profits. Second, the amended terms in the 2018 Agreements only

resolved Petitioners' control problems under two of the six *Intermountain Microwave* factors; the Commission continued to find evidence of DISH's *de facto* control under the remaining four factors, which the Commission found to outweigh the two areas in which control had been ceded back to Petitioners. Third, the 2018 Agreements did not eliminate Petitioners' substantial incentive to exercise their put rights to sell their businesses to DISH, which independently supported a finding of *de facto* control under the guidance in the *Fifth MO&O*.

Petitioners contend that the Commission erred in finding that the lease restriction in the 2018 Agreements conferred *de facto* control on DISH, because a lease restriction also appeared in the 2015 Agreements. Unlike the prior restriction on leasing, however, the newly added restriction expressly covers Petitioners' spectrum licenses, and prevents the companies from leasing those licenses in the ordinary course of business without DISH's consent. It was entirely proper for the Commission to consider this newly minted lease restriction as weighing in favor of DISH's control.

Petitioners also complain that the Commission improperly changed the focus of its control analysis to whether they have viable business options. However, Petitioners themselves raised the viability of those options to show that a sale of their licenses to DISH was not inevitable. On the merits, the

Commission reasonably concluded that because the 2018 Agreements enabled DISH to foreclose business options that provided alternatives to Petitioners' put rights, DISH retained control over Petitioners.

3. Finally, Petitioners contend that they lacked fair notice that the Commission would find that they had not cured their control problems. However, the Commission has long made clear that it considers the totality of the circumstances in evaluating *de facto* control. Petitioners therefore had ample notice that notwithstanding the elimination of their Management Services Agreements with DISH, and the specific changes they made to the 2015 Agreements, the Commission would still deny them bidding credits if the remaining provisions in those agreements perpetuated DISH's *de facto* control.

STANDARD OF REVIEW

Under the Administrative Procedure Act, an agency's orders must be affirmed unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This "deferential" standard of review "requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). On review, "a court may not substitute its own policy judgment for that of the agency," but instead "simply ensures that the agency

has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Id.* (citation omitted).

ARGUMENT

I. THE COMMISSION'S REMAND PROCEDURES COMPLIED WITH THIS COURT'S MANDATE AND WERE REASONABLE.

This Court in *SNR Wireless* held that even though "petitioners should reasonably have anticipated that the FCC might find them to be under DISH's *de facto* control … they lacked reasonable notice that, in the event it found *de facto* control, the Commission would deny them an opportunity to cure." 868 F.3d at 1044. On remand, the Commission gave Petitioners that opportunity by permitting them to amend and refile their original agreements with DISH, and giving them an opportunity (which they declined) to amend those agreements a second time in response to the comments by the parties.

A. The Commission Satisfied The Court's Mandate To Provide Petitioners An Opportunity To Cure.

Petitioners contend that the Commission's procedures on remand did not comply with this Court's mandate because they did not allow them to "engage in discussions with Commission staff to cure any remaining concerns about *de facto* control following Petitioners' modifications to their agreements." Pet. Br. at 23; *id.* at 21-27. The companies contend that because

the Court relied on the Commission's purported approval of the Bureau's *ClearComm* decision to find that they were entitled to a cure opportunity, the Commission's remand procedures must replicate those that the Bureau employed in *ClearComm*. *Id*. at 21-22. According to Petitioners, these involved "back-and-forth" discussions between a designated entity applicant and the Bureau to resolve any control problems. *Id*. at 23. In essence, Petitioners read the Court's mandate to require the Commission to provide them step-by-step guidance on how to re-write the terms in their various agreements with DISH until they are eligible for bidding credits.

Petitioners' argument is belied by this Court's decision. The Court described *ClearComm* as providing an "opportunity to cure," or a "chance to cure." *See, e.g.*, *SNR Wireless*, 868 F.3d at 1044-46. It did not specify any particular procedures by which that opportunity must be provided, much less a "*ClearComm*-like process." Pet. Br. 23. Or, as the Commission rightly explained: "The Court's point was not that the Commission (or staff) had established a specific procedure for cure that it had failed to afford [Petitioners], but that it had failed to provide reasonable notice that it 'would deny them an opportunity to cure' at all." *Remand Procedures Order* ¶ 16 (JA___) (quoting *SNR Wireless*, 868 F.3d at 1044). If the Court had directed

the Commission to apply the procedures in *ClearComm*, it would have said so.

Instead, the *only* specific instruction from the Court required the Commission to provide Petitioners an opportunity to renegotiate their agreements *with DISH* to cure the disqualifying *de facto* control:

> Petitioners contend that, in the past, the FCC has "compensate[d] for [a] lack of clarity in its control rules" by giving small companies a chance to modify their contractual agreements with large investors, in an effort to give the small companies enough independence to satisfy the FCC. *Petitioners seek precisely that kind of opportunity to modify their agreements with DISH*. Because the FCC did not give clear notice that such an opportunity would be denied, we conclude that an opportunity for petitioner to *renegotiate their agreements with DISH* provides the appropriate remedy here. We therefore remand this matter to the FCC for further proceedings consistent with our opinion.

SNR Wireless, 868 F.3d at 1046 (citations omitted) (emphasis added).

Petitioners do not explain why, if the Court intended for them to have the right to back-and-forth negotiations with the *Commission*, it directed the Commission to provide an opportunity for Petitioners to renegotiate their agreements with *DISH*. After all, the agreements that provided the basis for the Commission's (and the Court's) determination that Petitioners were subject to DISH's *de facto* control were between the two companies and DISH; there were no agreements between the companies and the

Commission. So, only through negotiations with DISH could Petitioners modify those agreements to cure their control problems.

Nor does the Court's mandate require the Commission or its staff to engage in "significant back-and-forth communications" with the Petitioners, Pet. Br. 23, or the opportunity to "modify (and further modify)" their agreements following those discussions. *Id.* at 24. For one thing, the Court gave the companies "an" opportunity to cure, not *opportunities* to cure, which would be the upshot of their demand for "the opportunity to modify (and further modify) its agreements following back-and-forth discussions with Commission staff." Pet. Br. 24.

Indeed, requiring the Commission's staff to provide detailed guidance on whether and in which respects the 2018 Agreements resolved Petitioners' control problems, in advance of a final determination by the Commission, would effectively require the agency to issue an advisory opinion. Just as "[c]ourts do not render advisory opinions," there is "no reason to require an agency to do so." *FTC v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 972 (D.C. Cir. 1980). Moreover, any input from the Bureau would have constituted informal staff guidance that would not bind the ultimate decision-maker in this case—the Commission. *Malkan FM Assocs. v. FCC*, 935 F.2d 1313, 1319 (D.C. Cir. 1991); *cf. Nat'l Fuel Gas Supply Corp. v. FERC*, 811

F.2d 1563, 1571 (D.C. Cir. 1987) (finding a "difference between binding legal actions taken by the Commission, such as approval of a settlement" and staff "negotiations that helped fashion the settlement").

This Court's decision to require the Commission to provide an opportunity to cure—without mandating the procedures by which that opportunity is provided—is also consistent with the FCC's broad authority to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j); *see FCC v. Schreiber*, 381 U.S. 279, 289 (1965). This Court has stated that once it remands a matter to the Commission, "[w]e have neither the inclination nor the authority to command the FCC to adopt procedures that seem desirable to us," much less those that Petitioners would prefer. *Bilingual Bicultural Coal. on Mass Media, Inc. v. FCC*, 595 F.2d 621, 634 (D.C. Cir. 1978). Nothing in the Court's mandate can be read to "override these basic principles of administrative law." *Remand Procedures Order* ¶ 16 (JA___).

Finally, the remand procedures selected by the Commission gave Petitioners far more than a "shot-in-the-dark" opportunity to cure. Pet. Br. 26. The *2015 Order* and the *SNR Wireless* decision spotlighted the many ways in which the 2015 Agreements needed to be reformed to eliminate DISH's disqualifying control. Given that extensive explanation, the Commission was

not required to provide for additional back-and-forth discussions with Commission staff to the same end.

B. The Commission's Remand Procedures Were Consistent With Agency Precedent.

Primarily relying on *ClearComm*, Petitioners also contend that the remand procedures depart from the agency's use of iterative negotiations with designated entities to resolve control issues, in violation of its duty to treat similarly situated parties the same. Pet. Br. 29-35 (citing *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965)). "To prevail upon a claim of disparate treatment," this Court has made clear, Petitioners "must demonstrate that the Commission's action was so inconsistent with its precedent as to constitute arbitrary treatment amounting to an abuse of discretion." *Lakeshore Broad., Inc. v. FCC*, 199 F.3d 468, 476 (D.C. Cir. 1999).

Petitioners are not similarly situated to the designated entity in *ClearComm*, or the other designated entities discussed in their brief, and for that reason, their disparate treatment claim fails. Pet. Br. 29-32. Unlike those parties, Petitioners received their cure opportunity *after* the Commission and this Court had explained why the companies were under DISH's *de facto* control. As the Commission pointed out, Petitioners have not identified a single instance where a designated entity applicant, prior to its interactions

with Commission staff, had the extensive, written guidance already provided to Petitioners. *Remand Procedures Order* ¶ 19 (JA___). *Melody Music* "is not in point" where "there is no close parallel or relationship between the facts and the issues presented and any other case." *Continental Broad. v. FCC*, 439 F.2d 580, 583 (D.C. Cir. 1971).

Though Petitioners challenge the Commission's distinction that *ClearComm* did not involve an auction, Pet. Br. 34, they ignore the Commission's additional statement that *ClearComm* also did not "involve a situation in which the [designated entity] had ceded control to its investor"—a finding that this Court upheld in *SNR Wireless*. *Remand Procedures Order* n.65 (JA___). The Commission can treat parties differently if it provides a reasonable explanation for why they are different. *See Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 10 (D.C. Cir. 2006).

In any event, even if *ClearComm* required the Commission to give Petitioners guidance on solving their control problems, the agency satisfied that duty. The Commission provided "extensive analysis of the *de facto* control problems" in the 2015 Agreements, and "set forth in great detail the [Commission's] application of the *de facto* control standard." *Remand Procedures Order* ¶ 20 (JA___). This Court's decision likewise "contained a point-by-point elaboration of the Commission's analysis," and provided

further guidance about the "specific problematic aspects" in those agreements. *Id*. Prior to any cure opportunity, Petitioners had thus already received far more guidance from the Commission about their control problems than the designated entity in *ClearComm*—the only difference was that the guidance came from the Commission and it was in writing. *Id.* Moreover, after submitting the 2018 Agreements to the Commission, the companies each had a final opportunity (which they ultimately forewent) to amend those agreements to address issues raised by other parties. *Remand Order* ¶ 35 (JA____).

* * *

In summary, neither this Court's mandate nor agency precedent required Commission staff to engage in unlimited back-and-forth discussions with Petitioners over how the companies should restructure their agreements with DISH. *See Remand Procedures Order* ¶ 20 (JA___). On the contrary, the *2015 Order*, and this Court's decision in *SNR Wireless*, provided Petitioners more than enough guidance on how to cure the control problems that the Commission and the Court had identified.

II. THE COMMISSION REASONABLY CONCLUDED THAT DISH RETAINED *DE FACTO* CONTROL OF PETITIONERS.

The Commission also reasonably determined that, despite the revisions in their agreements with DISH, "[Petitioners] are not eligible for bidding credits because they remain under DISH's *de facto* control." *Remand Order* ¶ 5 (JA___).

1. Applying the "totality-of-circumstances" approach in *Intermountain Microwave*, the Commission determined that the 2018 Agreements maintained DISH's control of Petitioners, because any use of the licenses by Petitioners must be approved by DISH. *See, e.g.*, *Remand Order* ¶¶ 62, 70-71, 110 (JA___, ___, ___). DISH has the right, but not an obligation, to loan Petitioners the billions of dollars needed to build out and operate wireless networks in compliance with the deadlines set by Commission rules.[1] DISH can also veto Petitioners' acquisition of any third-party debt that DISH deems "significant," even though such amounts would be necessary for Northstar and SNR to build out their wireless networks. *Id.* ¶ 70 (JA___). Further, any

[1] Petitioners must provide service to 40 percent of the population covered by each license in six years (October 2021) and 75 percent of that population in 12 years (October 2027), but if they do not meet the first milestone, then they must meet the second milestone in 10 years (October 2025). *Remand Order* n.282 (JA___).

lease of any of Petitioners' spectrum licenses qualifying as "major assets" requires DISH's prior written approval. *Id.* ¶ 71 (JA___). The result is that Petitioners cannot build-out or lease their licenses without DISH's consent.

The 2018 Agreements also restructured DISH's interest in each of the Petitioners so that their multi-billion-dollar debt to DISH was reduced to $500 million, with the remainder transformed into preferred equity for DISH. Petitioners, however, still owe DISH interest on the original loan amounts that accrued before they were restructured. *Id.* ¶¶ 81, 97 (JA___, ___). In addition, Petitioners must now make quarterly dividend payments, which if not paid in cash, are transformed into more preferred equity for DISH. *Id.* While the form of the debt has changed, the magnitude of Petitioners' financial obligation to DISH remains massive. *Id.* ¶ 82 (JA___).

As nascent companies, Petitioners are unlikely to generate enough revenue in the foreseeable future to pay their dividends. Thus, the value of their Managing Members' common equity in each company will decline as DISH's equity grows, leaving DISH as the only party that could enjoy any profits upon a sale or dissolution of the companies. *Id.* ¶ 100 (JA___). It will also be nearly impossible for Petitioners' Managing Members to sell their interests to a third party before those interests evaporate. For one thing, they may not sell their interests to a competitor of DISH's, even though other

wireless providers are the only entities that are likely to be interested in buying the Managing Members' stake in each company. *Id.* ¶¶ 112, 135, n.25 (JA___, ___).

The Commission separately found, for a second time, that DISH had *de facto* control of Petitioners under the guidance in the *Fifth MO&O*. Although the 2018 Agreements added a second put window, and both windows now stay open for 60 days (from 30 days), those changes did not affect the Commission's earlier conclusion that the put rights in the 2015 Agreements were engineered to provide Petitioners an overwhelming incentive to sell their licenses to DISH. *Id.* ¶¶ 128-137 (JA___).

2. Petitioners claim to have cured the control problems by eliminating three aspects of the 2015 Agreements that resulted in the Commission's prior finding of *de facto* control: (1) the Management Services Agreements between DISH and Petitioners; (2) the restrictions on Petitioners' ability to make employment decisions; and (3) the interoperability requirement that forced Petitioners to use a technology of DISH's choosing. These were significant changes, but, as we explain, the Commission reasonably found that they did not eliminate DISH's *de facto* control of Petitioners.

First, the 2018 Agreements created a new control problem by giving DISH the absolute right to veto any attempt by Petitioners to lease any of

their spectrum licenses to any meaningful extent, if not altogether. That right—in combination with DISH's ability to control Petitioners' access to funding to construct and operate wireless networks—means that Petitioners cannot monetize their spectrum licenses without DISH's consent.

Second, the 2018 Agreements addressed some but not all of the Commission's concerns under the six *Intermountain Microwave* factors. After examining all the contract terms in relation to one another, and taking account of the economic realities of Petitioners' relationships with DISH, the Commission reasonably concluded that four of the six *Intermountain Microwave* factors indicated that DISH retained *de facto* control of Petitioners.

Third, in the 2018 Agreements, the parties elected not to eliminate the exit strategy for Petitioners contemplated by the put rights, which had led to the Commission's earlier finding (approved by this Court) that DISH exercised *de facto* control over Petitioners based on an almost identical example in the *Fifth MO&O*. *See SNR Wireless*, 868 F.3d at 1035.

A. DISH's New Authority To Veto Leasing Of Petitioners' Spectrum Licenses Maintained Its *De Facto* Control.

In the *2015 Order*, the Commission determined that 19 investor protections provided DISH under the 2015 Agreements extended beyond

those typically given to a minority investor and thus gave DISH an "impermissible level of control" over Petitioners. *2015 Order* ¶ 59 (JA___).

On remand, the companies negotiated six new investor protections—two of which, the Commission found, "reinforce DISH's control." *Remand Order* ¶ 69 (JA___). First, DISH has the right to veto any attempt by Petitioners to incur "significant" secured and unsecured debt. This means that DISH can foreclose Petitioners' ability to obtain financing from third parties for the billions of dollars they need to construct wireless networks. *Id.* ¶ 70 (JA___). Second, under the 2018 Agreements, DISH can veto Petitioners' attempts to lease their spectrum licenses. *Id.* ¶ 71 (JA___). DISH's "newfound ability to control whether [Petitioners] can pursue" spectrum leasing "shuts down" their ability to generate revenue without "engaging in the capital-intensive buildout and operation of their own wireless networks." *Id*. ¶ 62 (JA___).

Petitioners contend that because the Commission's control finding in the *2015 Order* did not rely on a leasing restriction in the 2015 Agreements, it may not find that the leasing restriction in the 2018 Agreements conferred control on DISH. Pet. Br. 45. As the Commission pointed out, "that argument fundamentally misunderstands the Commission's long-established standard for evaluating *de facto* control based on an assessment of all of the facts and

circumstances." *Remand Order* ¶ 59 (JA___). Thus, whether or not the lease restriction in the 2018 Agreements was new, the Commission reasonably considered it "*in relation* to" other aspects of the 2018 Agreements in its control analysis. *Id*.

Even if such a limitation were sound, Petitioners' argument fails, because the leasing restriction in the 2018 Agreements is materially different from the leasing restriction in the 2015 Agreements.

Section 6.18 of Northstar's 2015 Credit Agreement ("Disposition of Assets") (JA___) stated:

> "Each Loan Party agrees that it shall not, without the prior written approval of Lender … sell, lease, convey, transfer, or otherwise dispose of its property or assets now owned or hereafter acquired except in the ordinary course of business."

Contrast that with § 1.1 of Northstar's 2018 LLC Agreement (JA___), which states:

> "All Significant Matters shall require the prior written approval of [DISH], in its sole and absolute discretion for any reason or no reason…."

With "significant matter" defined to include:

> "the sale, transfer, exchange, lease, mortgage, pledge or assignment or entry into any agreement for the sale, transfer, exchange, lease, mortgage, pledge or assignment of any major asset (where assets include, but are not limited to, licenses). *Id.*

As the quoted language demonstrates, the leasing restriction in the 2018 LLC Agreements is new in two important respects. First, the 2018 LLC

Agreements amended the definition of "assets" to "include … licenses." By contrast, the restriction in the 2015 Credit Agreements did not restrict the leasing of "licenses," only of "property and assets." A spectrum license is not "property" of the licensee; it is a right to use spectrum for the licensed purpose. 47 U.S.C. § 301 (authorizing the Commission to "provide for the use" of radio channels, "but not the ownership thereof"); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) (An FCC licensee does not obtain "a property right as a result of the granting of a license."). Moreover, if "property and assets" in the 2015 Credit Agreements had included licenses, there would have been no reason for the 2018 LLC Agreements to have separately identified "licenses" among the assets covered.

Second, the 2018 Agreements' terms are far more restrictive than those in the 2015 Agreements. The 2015 Credit Agreements required DISH's "prior approval" of a lease "except in the ordinary course of business." In contrast, the 2018 LLC Agreements provide that the "lease … of any major asset," whether or not in the ordinary course of business, requires "prior written approval from [DISH]." Thus, while under the 2015 Agreements DISH had only the authority to approve the lease of assets (not including spectrum licenses) outside the ordinary course of business, the 2018 Agreements grant

DISH new authority to approve the lease of licenses, whether "in the ordinary course of business" or not.

Petitioners also argue that Section 6.11(c) of the 2015 Credit Agreements (JA___) contained a leasing restriction. Pet. Br. 15 n.5. But that restriction is distinguishable because it also encompassed "business or property," not spectrum licenses (which are specifically identified as assets in the 2018 LLC Agreements). And even if it did encompass licenses, that restriction applied to only leasing arrangements involving "all or substantially all" of the licenses, and not routine leasing transactions.

Turning to the substance of the Commission's analysis, Petitioners liken the leasing restriction in the 2018 LLC Agreements to a restriction on the "sale of major corporate assets," which, they assert, the Commission recognized could be a "[p]ermissible investment protection." Pet. Br. 44 (quoting *Baker Creek*, 13 FCC Rcd 18709, 18710 (¶ 3) (PSPWD 1998)). As the Commission emphasized, however, the examples of "typical protections" in its *Baker Creek* decision do not have "talismanic properties." *Remand Order* ¶ 67 (JA___). Even typical investor protections can confer control upon an investor "where they give it the power to dominate the management of corporate affairs." *Baker Creek*, 13 FCC Rcd at 18715 (¶ 9). As always, "the analysis of whether an investment protection provision grants the

minority owner the power to control is a fact-based inquiry with no precise formula for evaluating all factors." *Id.*

Petitioners further argue that by defining "significant matter" to apply "to the extent consistent with the decision in *Baker Creek*," the leasing restriction in the definition could only cede a permissible degree of control to DISH. Pet. Br. 44-45; *see also id.* at 27-28. Petitioners' reliance on this reference to *Baker Creek* is misplaced, for two reasons. First, "the *Baker Creek* limitation on investor protections is illusory, because that decision does not identify some obvious or quantifiable 'threshold' of significance." *Remand Order* n.209 (JA___); *id.* ¶ 68 (JA___). Second, the Commission warned Petitioners in the *2015 Order* that "the mere insertion of language in agreements to superficially recite the factors set forth in our rules … cannot serve to avoid review of the economic realities of the parties' transactions." *2015 Order* ¶ 57 (JA___); *see SNR Wireless*, 868 F.3d at 1033 ("What matter[ed] … was the substance of the terms of DISH's control, not the formal recitations of compliance with *Intermountain Microwave*'s six control factors."). Merely stipulating that the leasing restriction was constrained by *Baker Creek* cannot inoculate that term from a control finding if the other circumstance of the relationship demand it. *Remand Order* ¶¶ 66-67 (JA___).

For all of these reasons, the Commission reasonably determined that the leasing restriction in the 2018 Agreements enabled DISH to maintain *de facto* control of Petitioners. *Id.* ¶ 71 (JA___).

B. DISH Retained *De Facto* Control Of Petitioners Under The *Intermountain Microwave* Factors.

Petitioners contend that the Commission's prior determination of *de facto* control "was largely premised on" the Management Services Agreements and the requirement that Petitioners' technology be interoperable with the technology selected by DISH. By eliminating those agreements and the interoperability requirement, Petitioners maintain that they "respond[ed] to the Commission's primary concerns." Pet. Br. 36; *id.* at 35-40.

The Commission found that by removing the interoperability requirement, the 2018 Agreements eliminated its concern that Petitioners would not have "unfettered use of all facilities and equipment." *Remand Order* ¶ 123 (JA___). It also determined that by eliminating the Management Services Agreements, and removing DISH's right to veto any employee salary over $200,000, Petitioners had alleviated the Commission's concern that DISH would exert undue control over Petitioners' employment decisions. *Id.* ¶ 78 (JA ___).

However, Petitioners ignore the rest of the Commission's *Intermountain Microwave* analysis—key aspects of which relied on DISH's

continuing ability to prevent Petitioners from constructing their own wireless networks, the companies' massive financial obligations to DISH, and the unlikelihood that the Managing Members of either company will ever see an operating profit from their spectrum licenses. The Commission reasonably determined that the 2018 Agreements did not resolve its concerns under the four remaining *Intermountain Microwave* factors, and for that reason, DISH had maintained its *de facto* control of Petitioners.

Control over Daily Operations. The Management Services Agreements between Petitioners and DISH were prominent in the Commission's determination in the *2015 Order* that DISH controlled their daily operations. *2015 Order* ¶¶ 70-72, 75-77 (JA___, ___). But that was not the only factor. The Commission also determined that Petitioners "d[id] not fully control their own business plans," which DISH "either prepared or participated in preparing," and could not be amended without "mandatory consultations with DISH." *Id.* ¶¶ 72-74 (JA___). It was "DISH's duties" under Management Services Agreements *in combination with* DISH's "broad consultative role" in the business plans that were "important indicia of DISH's control over [Petitioners'] daily operations" in the Commission's analysis. *Id*. Eliminating the Management Services Agreements, by itself, did not resolve those problems.

On remand, Petitioners amended the 2015 Agreements so that all future business plans and budgets "shall be adopted or modified … by the Manager in its sole and unilateral judgment," but only if there are "material changes affecting" the companies. *Remand Order* ¶¶ 74-75 (JA___); Northstar and SNR 2018 LLC Agreements, § 6.5(a) (JA___, ___). That change did not "fully resolve [the Commission's] concerns," because as the Commission pointed out, it only "grant[ed] [Petitioners] the theoretical ability to modify [the plans] without DISH's consent." *Remand Order* ¶¶ 75-76 (JA___).

Petitioners assert that the Commission erred in finding that they "remain locked into the business plans prepared during DISH's *de facto* control," because their original business plans expired before the *Remand Order*. Pet. Br. 50-51. But the 2018 Agreements were renegotiated before the original business plans had expired. The Commission found it significant that when given the opportunity to renegotiate their agreements, Petitioners did not secure a meaningfully less restrictive right to modify their DISH-dominated business plans. *Remand Order* ¶ 75 (JA___). It also reasonably predicted that Petitioners, after operating under the original business plans for five years, and with the construction deadlines for their licenses approaching, *id.* n.282 (JA___), would find their subsequent five-year business plans

constrained by the original plans. *Id.* ¶ 75 (JA___); *see NTCH, Inc. v. FCC*, 950 F.3d 871, 879, 880-881 (D.C. Cir. 2020).

Petitioners also mischaracterize the Commission's treatment of the "materially change" clause, which likewise appeared in the 2015 Agreements. The Commission did not find that the clause was a newly discovered "defect," Pet. Br. 51, only that, by still requiring that a change to the business plans follow from a "material change" affecting the businesses, the retained clause blunts the impact of eliminating DISH's consultation right. *Remand Order* ¶¶ 75-76 (JA___).

Responsibility for Financial Aspects of the Business. In the *2015 Order*, the Commission determined that DISH "dominate[d] the financial aspects of [Petitioners'] businesses" because DISH was "the source of the vast majority of [their] capital," including their winning bid amounts and future construction and operating costs. Petitioners also could not acquire meaningful funds from other sources, "intensifying [their] dependence on DISH." *2015 Order* ¶¶ 84-85 (JA___). This Court affirmed those conclusions. *SNR Wireless*, 868 F.3d at 1033.

Though the parties have restructured the nature of DISH's $13 billion interest in Petitioners, "the sheer quantity of their financial obligations remains the same," *Remand Order* ¶ 82 (JA___), and DISH can still limit the

companies' ability to obtain funding from other sources. *Id*. ¶ 91 (JA___). If DISH makes funding available—which it is under no obligation to do—that just increases Petitioners' financial dependence. *Id.* ¶ 84 (JA___). Indeed, the Commission expected that the costs to build out Petitioners' licenses would be 10 times their current debt to DISH. *Id.* ¶ 89 (JA___).

Petitioners dismiss the Commission's discussion of their financial responsibility to DISH as "address[ing] matters only tangentially related to" the *Intermountain Microwave* analysis. Pet. Br. 49. That characterization defies a fair reading of the *Remand Order*, which discusses at length Petitioners' access to build-out funding from DISH and third-parties, and the amounts Petitioners owe DISH today and will owe DISH in the future. These are the very same concerns that underlay the Commission's control finding in the *2015 Order*. *Compare Remand Order* ¶¶ 80-92 (JA___) *with 2015 Order* ¶¶ 84-86 (JA___).

Receipt of Monies and Profit. As this Court recognized, 868 F.3d at 1033, in the *2015 Order* the Commission found that "before realizing any profits from their business operations, [Petitioners] would first have to repay the billions of dollars in loans they owed to DISH," which would be "very unlikely for the foreseeable future" given that "[Petitioners] would need to undertake extensive construction before they could begin providing wireless

service." *2015 Order* ¶¶ 87-93 (JA___). Under the 2018 Agreements, Petitioners still have "an overwhelming financial obligation to DISH," and DISH can stymie the companies' ability to meet their financial obligations by limiting the amounts it lends to them for network construction, prohibiting them from obtaining third-party loans, and vetoing leasing arrangements. *Id*. ¶¶ 99-100, 101-102 (JA___, ___).

Petitioners' sole response is that the Commission's analysis was flawed because it took account of the spectrum leasing restriction, the significance of which they dispute. Pet. Br. 49-50. The companies are wrong on that score, *see* pp. 40-45, above, but even if DISH permits leasing, the Commission reasonably determined that they are unlikely to see any profits given the enormity of their ever-growing financial obligations to DISH.

Control of Policy Decisions. The Commission in the *2015 Order* determined that a number of provisions in the 2015 Agreements "restrict[ed]" Petitioners "from critical decisions that would normally remain within an independent entity's control." *2015 Order* ¶ 94 (JA___). In affirming that determination, this Court observed "that DISH effectively controlled … every essential policy decision for [Petitioners'] businesses" including "the type of wireless technology that [Petitioners'] would use," "the timetable for [Petitioners] to build networks and begin offering services to customers," and

"when [Petitioners] might sell their businesses." *SNR Wireless*, 868 F.3d at 1033.

On remand, the Commission acknowledged that Petitioners had eliminated the Management Services Agreements and the interoperability restriction. *Remand Order* ¶ 107 (JA___). However, it concluded that DISH "continues to control" Petitioners' policy decisions because it can restrict their access to third-party debt, veto the lease of their licenses, and determine when and how they exit the businesses. *Id*. ¶¶ 111-114 (JA___). "[D]ozens of pages of virtually identical" terms in Petitioners' agreements with DISH reinforced the Commission's conclusion that Petitioners "continue to function as 'arms of DISH.'" *Id*. ¶ 115 (JA___) (quoting *SNR Wireless*, 868 F.3d at 1025).

According to Petitioners, the Commission's discussion of this factor "merely recycles the Commission's baseless concerns about DISH compelling [Petitioners] to exercise their put rights" and ignores that "[Petitioners] can generate substantial income by leasing." Pet. Br. 50. Petitioners' response misses the Commission's point, which was that if Petitioners want to lease their licenses or construct and operate a wireless network, they have to obtain DISH's approval to do so. *Remand Order* ¶¶ 109-110 (JA___). If Petitioners were truly independent from DISH, they

should have some separate say in how they use their licenses. DISH's ability to veto their business choices underscores that DISH continues to control Petitioners' most basic policy decisions.

Petitioners also contend that the Commission erred in finding that "dozens of pages of virtually identical" provisions in both the Northstar and SNR 2018 Agreements "provide persuasive additional evidence" that they were "serving as 'arms of DISH.'" *Id.* ¶ 115 (JA___). According to Petitioners, "[i]t made perfect sense . . . to respond to what both the Commission and this Court said were similar deficiencies in their applications by making similar changes." Pet. Br. 52. But there was no reason for the two companies to amend the same terms in precisely the same way. Northstar owes DISH $2 billion more than SNR, yet Northstar and SNR both converted all but $500 million of their debt to preferred equity with the same terms. *Remand Order* ¶¶ 118-119 (JA___). Northstar and SNR also have different spectrum license portfolios, yet they both agreed to essentially the same limit on build-out funding from DISH. *Id*. These different economic circumstances "might be expected to have resulted in different negotiating strategies and outcomes." *Id.* ¶ 118 (JA___).

* * *

In summary, the Commission found that the 2018 Agreements eliminated some, but not nearly all of the Commission's control concerns under the *Intermountain Microwave* standard. After a detailed examination of those agreements, and taking account of the economic realities of Petitioners' relationships with DISH, the Commission concluded that "DISH's remaining controls continue to vest it with *de facto* control." *Id.* ¶ 64 (JA___).

C. DISH Retained *De Facto* Control Of Petitioners Under The Guidance In The *Fifth MO&O*.

The Commission also determined that, separate and apart from its analysis under *Intermountain Microwave*, the *Fifth MO&O* "supports a finding that the modified put rights" in the 2018 Agreements "effectuate a transfer of control over Northstar and SNR to DISH." *Remand Order* ¶ 124 (JA___).

The *Fifth MO&O* holds that a transfer of control occurs when an investor "financially … force[s]" a designated entity "into a sale (or major refinancing)." 10 FCC Rcd at 456. In the *2015 Order*, the Commission determined that Petitioners' obligation to repay their multi-billion-dollar debt, combined with DISH's ability to restrict their ability to generate revenue or sell their interests, left Petitioners little choice but to exercise a put right that required DISH to buy their interests for a generous rate of return. *2015 Order* ¶¶ 102-105 (JA___). In affirming the Commission, this Court observed that

"SNR and Northstar would have every interest in selling their businesses to DISH at the first possible moment" because it was the "only … path to avoiding certain financial failure." *SNR Wireless*, 868 F.3d at 1034, 1035.

The 2018 Agreements expanded the put window in year five "from 30 to 90 days," added a second put window after year six, and included an opportunity for a "fair market value appraisal" in year seven. *Remand Order* ¶ 128 (JA ___). The Commission found that the year five and year six put options involve a "generous payout" that is "independent of the fair market value of the companies, does not depend on whether they have made any progress in deploying, using, or leasing their spectrum, and does not trigger DISH's priority rights as to its debt or preferred equity." *Id.* ¶ 130 (JA ___).

Yet just as under the 2015 Agreements, "SNR and Northstar are committed to repayments terms that will be difficult, if not impossible, to manage unless they exercise their put option[s]." *Id.* ¶ 131 (JA ___) (quoting *2015 Order* ¶ 105 (JA ___)). Petitioners owe billions of dollars to DISH, *id.* ¶ 133 (JA ___), and DISH "can make it difficult if not impossible" for them "to generate enough revenues to satisfy those obligations," whether by engaging in the highly "capital intensive" process of building out their networks by the deadlines set forth in the Commission's rules, or by "leasing their spectrum to other network providers." *Id.* ¶ 134 (JA___).

The Commission thus concluded that despite the modifications to the put rights, Petitioners still had an enormous incentive to exercise those rights—with their guaranteed, generous return on investment—rather than risk that they would not see any return at all. *Id*. ¶ 133 (JA___). "[T]he Commission's predictive judgments within its field of discretion and expertise are entitled to particularly deferential review as long as they are reasonable," *NTCH*, 950 F.3d at 880 (cleaned up), and the Court "judge[s] the reasonableness of an agency's decision on the basis of the record before the agency at the time it made its decision." *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1107 (D.C. Cir. 2009). Because the put rights in the context of the 2018 Agreements "still appear[ed] to be designed to maximize the incentive of [Petitioners] to sell," the Commission reasonably held that they effect a transfer of *de facto* control from Petitioners to DISH under the guidance in the *Fifth MO&O*. *Remand Order* ¶ 136 (JA___).

Petitioners contend that a sale to DISH was not an inevitable consequence of their agreements with DISH. Pet. Br. 40-53. In support, Petitioners submitted the testimony of their economic consultant, Carlyn Taylor, who maintained that they "have multiple viable business options," other than exercising their put rights: (1) "deploying a wireless network," (2) offering wireless capacity on a "wholesale basis," and (3) "spectrum sharing,"

including "spectrum leasing." *Id*. at 41-43. *See* Consolidated Opposition of SNR Wireless LicenseCo, LLC and Northstar Wireless, LLC, ULS File Nos. 0006670613 and 0006670667 (filed Oct. 22, 2018) at 28-29 & Ex. B (JA___, ___).

In the *Remand Order*, the Commission explained at length why Taylor's testimony is "both speculative and conclusory—and ultimately unpersuasive." *Remand Order* ¶ 139 (JA___); *see id*. ¶¶ 140-146 (JA___). As the Commission pointed out, Taylor's analysis is based on assumptions that are inconsistent with the terms in the 2018 Agreements and the companies' activities to date.

For example, in stating that the rising value of wireless spectrum might encourage Petitioners to hold onto their licenses, Pet. Br. 42, Taylor did not consider the companies' massive financial obligations to DISH, nor did Taylor identify any steps that Petitioners have taken to "start generating revenue … in advance of the put options." *Remand Order* ¶ 141 (JA___). As the Commission explained, "building and operating a wireless network … is capital intensive," and would "requir[e] [Petitioners] to incur further debt from DISH (which … it may not be obligated to furnish in full)" or "to seek third-party unsecured funding (subject to DISH's veto when in 'significant' amounts)." *Id*. ¶ 143 (JA___).

As for Petitioners marketing their spectrum on a wholesale basis, that would depend on the value of spectrum to third-party customers. According to Taylor, the AWS-3 spectrum acquired by Petitioners is particularly valuable because it can be paired with Advanced Wireless Services-4 (AWS-4) spectrum. Taylor Decl. ¶ 17 (JA__). However, two DISH subsidiaries hold all the AWS-4 licenses with which Taylor identified Petitioners' licenses could be paired. *Remand Order* ¶ 144 (JA___).[2] The option of pairing their licenses with those held by any entity other than DISH is thus "wholly illusory," as the Commission concluded. *Id*.

Finally, the Commission explained, Taylor's suggestion that Petitioners could lease their spectrum to third parties "overlooks" the fact that the 2018

[2] Shortly before Petitioners and DISH executed the 2018 Agreements, those DISH subsidiaries notified the Commission that they were considering using Petitioners' AWS-3 licenses in combination with their own AWS-4 licenses. *See e.g.*, ULS File No. 0007690538, Consolidated Interim Construction Notification (filed Mar. 7, 2017) at 5 (available at https://wireless2.fcc.gov/UlsEntry/attachments/attachmentViewRD.jsp?applType=search&fileKey=1124419849&attachmentKey=20103055&attachmentInd=applAttach) ("[T]he current plan is to deploy a network on our own, or in possible cooperation with [Northstar and SNR], two entities in which DISH subsidiaries made non-controlling investments in connection with the AWS-3 auction."); *id*. at 11 ("Currently, DISH is in discussions with each of [Petitioners] to negotiate commercial terms to potentially enable the deployment of their respective AWS-3 uplink spectrum...."); *id.* at 14 (explaining how the AWS-3 and AWS-4 blocks could be combined); *id*. at 16 (same).

Agreements require DISH's approval for the lease of any major asset, including spectrum licenses. *Id.* ¶ 145 (JA___). In fact, the Commission's records showed that "[a]s of October 5, 2020, neither SNR nor Northstar ha[d] entered into *any* lease of *any* of its … AWS-3 licenses." *Id.* ¶ 141 (JA___).

At all events, the Commission observed, Taylor's testimony was effectively "foreclosed" by this Court's prior decision, which concluded that the terms in the 2015 Agreements made it "virtually certain" that Petitioners would sell to DISH. *Id.* ¶ 138 (JA___). *See* 868 F.3d at 1035. As the Commission found, Petitioners' incentive to exercise their put rights "is not materially different now from what the Commission and the court found problematic before." *Remand Order* ¶ 138 (JA___).[3]

[3] Not properly before the Court is DISH's argument that the Commission's denial of bidding credits to Petitioners is "counter to the important and longstanding Commission policy of promoting competition," DISH Br. 18, because it was not first presented to the Commission. *See* 47 U.S.C. § 405(a); *Nat'l Lifeline Ass'n v. FCC*, 983 F.3d 498, 509 (D.C. Cir. 2020). The argument is meritless in any event. The general goal of "promoting competition" in the marketplace for wireless services does not empower the Commission to ignore Congress's directive to design auction requirements that "prevent unjust enrichment." *In re Aiken County*, 725 F.3d 255, 260 (D.C. Cir. 2013); 47 U.S.C. § 309(j)(4).

III. PETITIONERS HAD FAIR NOTICE THAT THEIR REVISED AGREEMENTS MAINTAINED DISH'S *DE FACTO* CONTROL.

Petitioners contend that even if the Court affirms the Commission's finding of *de facto* control, it should nonetheless remand the Orders on review based on a purported lack of fair notice. Pet. Br. 53. Each of Petitioners' fair notice claims is meritless.

First, Petitioners contend that they "could not have ascertained that they (again) would be denied the opportunity to revise their agreements with guidance from the Commission." *Id*. (citing Pet. Br. 29-35). Even if Petitioners oppose the cure process established by the Bureau (and affirmed by the Commission), they had notice of it before revising their agreements with DISH, and thus cannot blame the control problems in the 2018 Agreements on a lack of notice about the remand procedures.

Second, Petitioners claim that they "could not have ascertained that the Commission would respond to their deletion of the Management Services Agreement and the technology provision by pivoting to an emphasis on the restriction on leasing." *Id*. That argument is baseless. Petitioners were well aware that the Commission's *de facto* control inquiry involves an examination of all of the circumstances surrounding the relationship between a designated entity applicant and its investor. *See, e.g.*, *2015 Order* ¶ 63

(JA___); *SNR Wireless*, 868 at 1033-34. Thus, Petitioners could not reasonably have expected that just because they had removed DISH as the Operations Manager and deleted the interoperability restriction, the Commission would not have examined the other remaining (and newly introduced) aspects of their relationship to determine *de facto* control. A totality of the circumstance inquiry means that it is the totality, not one or two factors, that control.

Lastly, Petitioners contend that they had every reason to expect that the Commission would follow the Bureau's grant, after this Court's remand, of bidding credits to another Auction 97 designated entity, Advantage Spectrum. Pet. Br. 55. But as this Court has explained: "The FCC is not bound to treat the provisions of agreements filed with a pair of long-form applications, which the Wireless Bureau administratively granted without opinion or any public statement of reasons, as if those provisions established a Commission position from which it could not deviate without reasoned explanation." *SNR Wireless*, 868 F.3d at 1037. Consistent with past practice, the Bureau did not offer any reasoning for its one-word grant of the Advantage Spectrum application, let alone explain why it did not find a *de facto* control problem. *Remand Order* ¶ 156 (JA___). Petitioners "were undoubtedly aware" that the Bureau's grant of other bidding credit applications "would not be

precedential," and for that reason, they should have "engag[ed] in a substantive analysis of DISH's continuing control" rather than looking to another bidding credit applicant's agreements.[4] *Id.* ¶ 154 (JA___). Petitioners thus had "ample notice" that the Advantage Spectrum grant was neither precedential or binding on the Commission. *Id.* ¶ 156 (JA___).

* * *

It is not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952). Petitioners had extensive guidance from the Commission and this Court about how to re-write their agreements with DISH to resolve their control problems. That Petitioners were still found to be under DISH's *de facto* control does not establish that Petitioners lacked fair notice of how to comply—it shows that Petitioners misjudged the maximum amount of control that they could cede to DISH and still be eligible for bidding credits.

[4] DISH's disparate treatment claim, which is based on the Commission's alleged failure to treat DISH the same as Advantage Spectrum's investor (United States Cellular Corporation) and another Auction 97 designated entity's investor (Terrestar Corporation), fails for the same reason. DISH Br. 13-18. It "was not necessary for the FCC to address these nonbinding decisions" in the *Remand Order*. *Amor Family Broad. Grp. v. FCC*, 918 F.2d 960, 962-963 (D.C. Cir. 1990).

CONCLUSION

The Court should affirm the Orders and deny the petitions for review.

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Appendix of Statutes and Regulations

Contents

5 U.S.C. § 706
Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

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(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

28 U.S.C. § 2342
Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

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47 U.S.C. § 154
Federal Communications Commission

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(j) Conduct of proceedings; hearings

The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

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47 U.S.C. § 301
License for radio communication or transmission of energy

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States (except as provided in section 303(t) of this title); or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

47 U.S.C. § 309
Application for license

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(j) Use of competitive bidding

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(3) Design of systems of competitive bidding

For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation, establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances. The Commission shall, directly or by contract, provide for the design and conduct (for purposes of testing) of competitive bidding using a contingent combinatorial bidding system that permits prospective bidders to bid on combinations or groups of licenses in a single bid and to enter multiple alternative bids within a single bidding round. In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust

enrichment through the methods employed to award uses of that resource;

(D) efficient and intensive use of the electromagnetic spectrum;

(E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed—

(i) before issuance of bidding rules, to permit notice and comment on proposed auction procedures; and

(ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services; and

(F) for any auction of eligible frequencies described in section 113(g)(2) of the National Telecommunications and Information Administration Organization Act (47 U.S.C. 923(g)(2)), the recovery of 110 percent of estimated relocation or sharing costs as provided to the Commission pursuant to section 113(g)(4) of such Act.

(4) Contents of regulations

In prescribing regulations pursuant to paragraph (3), the Commission shall—

(A) consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;

(B) include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services;

(C) consistent with the public interest, convenience, and necessity, the purposes of this chapter, and the characteristics of the proposed service,

prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services;

(D) ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures;

(E) require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits; and

(F) prescribe methods by which a reasonable reserve price will be required, or a minimum bid will be established, to obtain any license or permit being assigned pursuant to the competitive bidding, unless the Commission determines that such a reserve price or minimum bid is not in the public interest.

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47 U.S.C. § 402
Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

(10) By any person who is aggrieved or whose interests are adversely affected by a determination made by the Commission under section 618(a)(3) of this title.

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47 U.S.C. § 405
Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: Provided, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which

the Commission gives public notice of the order, decision, report, or action complained of.

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47 C.F.R. § 1.2110
Designated Entities

(a) Designated entities are small businesses (including businesses owned by members of minority groups and/or women), rural telephone companies, and eligible rural service providers.

(b) Eligibility for small business and entrepreneur provisions—

(1) Size attribution.

(i) The gross revenues of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests shall be attributed to the applicant (or licensee) and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as a small business, very small business, or entrepreneur, as those terms are defined in the service-specific rules. An applicant seeking status as a small business, very small business, or entrepreneur, as those terms are defined in the service-specific rules, must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues for each of the previous three years of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests.

(ii) if applicable, pursuant to § 24.709 of this chapter, the total assets of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests shall be attributed to the applicant (or licensee) and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as an entrepreneur. An applicant seeking status as an entrepreneur must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues for each of the previous two years of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests.

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(c) Definitions—

(2) Controlling interests.

(ii) Calculation of certain interests.

(H) Any person who manages the operations of an applicant or licensee pursuant to a management agreement shall be considered to have a controlling interest in such applicant or licensee if such person, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence:

(1) The nature or types of services offered by such an applicant or licensee;

(2) The terms upon which such services are offered; or

(3) The prices charged for such services.

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(5) Affiliate.

(i) An individual or entity is an affiliate of an applicant or of a person holding an attributable interest in an applicant if such individual or entity—

(A) Directly or indirectly controls or has the power to control the applicant, or

(B) Is directly or indirectly controlled by the applicant, or

(C) Is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or

(D) Has an "identity of interest" with the applicant.

(ii) Nature of control in determining affiliation.

(A) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

Example. An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting stock to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power to control.

(B) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(C) Control can arise through management positions where a concern's voting stock is so widely distributed that no effective control can be established.

Example. In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are persons with attributable interests in the applicant, the other entity will be deemed an affiliate of the applicant.

(iii) Identity of interest between and among persons. Affiliation can arise between or among two or more persons with an identity of interest, such

as members of the same family or persons with common investments. In determining if the applicant controls or has the power to control a concern, persons with an identity of interest will be treated as though they were one person.

Example. Two shareholders in Corporation Y each have attributable interests in the same PCS application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. The two shareholders with these common investments (or identity in interest) are treated as though they are one person and Corporation Y would be deemed an affiliate of the applicant.

(A) Spousal affiliation. Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States. In calculating their net worth, investors who are legally separated must include their share of interests in property held jointly with a spouse.

(B) Kinship affiliation. Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father or -mother, step-brother or -sister, step-son or -daughter, half brother or sister. This presumption may be rebutted by showing that the family members are estranged, the family ties are remote, or the family members are not closely involved with each other in business matters.

Example. A owns a controlling interest in Corporation X. A's sister-in-law, B, has an attributable interest in a PCS application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation Y is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(iv) Affiliation through stock ownership.

(A) An applicant is presumed to control or have the power to control a concern if he or she owns or controls or has the power to control 50 percent or more of its voting stock.

(B) An applicant is presumed to control or have the power to control a concern even though he or she owns, controls or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he or she owns, controls or has the power to control is large as compared with any other outstanding block of stock.

(C) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(v) Affiliation arising under stock options, convertible debentures, and agreements to merge. Except as set forth in paragraph (c)(2)(ii)(A)(2) of this section, stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements are generally treated as though the rights held thereunder had been exercised. However, an affiliate cannot use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1 to paragraph (c)(5)(v). If company B holds an option to purchase a controlling interest in company A, who holds an attributable interest in a PCS application, the situation is treated as though company B had exercised its rights and had become owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

Example 2. If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in a PCS application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its option to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3. If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

Note to paragraph (c)(5)(v): Mutually exclusive contingent ownership interests, i.e., one or more ownership interests that, by their terms, are mutually exclusive of one or more other ownership interests, shall be calculated as having been fully exercised only in the possible combinations in which they can be exercised by their holder(s). A contingent ownership interest is mutually exclusive of another only if contractual language specifies that both interests cannot be held simultaneously as present ownership interests.

(vi) Affiliation under voting trusts.

(A) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(B) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(C) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered

valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(vii) Affiliation through common management. Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

(viii) Affiliation through common facilities. Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(ix) Affiliation through contractual relationships. Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern.

(x) Affiliation under joint venture arrangements.

(A) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a joint venture.

(B) The parties to a joint venture are considered to be affiliated with each other. Nothing in this subsection shall be construed to define a small business consortium, for purposes of determining status as a designated entity, as a joint venture under attribution standards provided in this section.

(xi) Exclusion from affiliation coverage. For purposes of this section, Indian tribes or Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), or entities owned and controlled by such tribes or corporations, are not considered affiliates of an applicant (or licensee) that is owned and controlled by such tribes, corporations or entities, and that otherwise complies with the requirements of this section, except that gross revenues derived from gaming activities conducted by affiliate entities pursuant to the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) will be counted in determining such applicant's (or licensee's) compliance with the financial requirements of this section, unless such applicant establishes that it will not receive a substantial unfair competitive advantage because significant legal constraints restrict the applicant's ability to access such gross revenues.

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(f) Bidding credits.

(1) The Commission may award bidding credits (i.e., payment discounts) to eligible designated entities. Competitive bidding rules applicable to individual services will specify the designated entities eligible for bidding credits, the licenses for which bidding credits are available, the amounts of bidding credits and other procedures.

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(j) Designated entities must describe on their long-form applications how they satisfy the requirements for eligibility for designated entity status, and must list and summarize on their long-form applications all agreements that affect designated entity status such as partnership agreements, shareholder agreements, management agreements, spectrum leasing arrangements, spectrum resale (including wholesale) arrangements, spectrum use agreements, and all other agreements including oral agreements, establishing as applicable, de facto or de jure control of the entity. Designated entities also must provide the date(s) on which they entered into each of the agreements listed. In addition, designated entities must file with their long-form applications a copy of each such agreement. In order to enable the Commission to audit designated entity eligibility on an ongoing basis, designated entities that are awarded eligibility must, for the term of the license, maintain at

their facilities or with their designated agents the lists, summaries, dates and copies of agreements required to be identified and provided to the Commission pursuant to this paragraph and to § 1.2114.

47 C.F.R. § 1.2111(b) (2014)
Assignment or transfer of control: unjust enrichment

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(b) Unjust enrichment payment: bidding credits.

(1) A licensee that utilizes a bidding credit, and that during the initial term seeks to assign or transfer control of a license to an entity that does not meet the eligibility criteria for a bidding credit, will be required to reimburse the U.S. Government for the amount of the bidding credit, plus interest based on the rate for ten year U.S. Treasury obligations applicable on the date the license was granted, as a condition of Commission approval of the assignment or transfer. If, within the initial term of the license, a licensee that utilizes a bidding credit seeks to assign or transfer control of a license to an entity that is eligible for a lower bidding credit, the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify, plus interest based on the rate for ten year U.S. Treasury obligations applicable on the date the license is granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer. If, within the initial term of the license, a licensee that utilizes a bidding credit seeks to make any ownership change that would result in the licensee losing eligibility for a bidding credit (or qualifying for a lower bidding credit), the amount of the bidding credit (or the difference between the bidding credit originally obtained and the bidding credit for which the licensee would qualify after restructuring), plus interest based on the rate for ten year U.S. Treasury obligations applicable on the date the license is granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer or of a reportable eligibility event (see § 1.2114).

(2) Payment schedule.

(i) The amount of payments made pursuant to paragraph (d)(1) of this section will be reduced over time as follows:

(A) A transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or in the case of very small businesses transferring to small businesses, 100 percent of the difference between the bidding credit received

by the former and the bidding credit for which the latter is eligible);

(B) A transfer in year 3 of the license term will result in a forfeiture of 75 percent of the value of the bidding credit;

(C) A transfer in year 4 of the license term will result in a forfeiture of 50 percent of the value of the bidding credit;

(D) A transfer in year 5 of the license term will result in a forfeiture of 25 percent of the value of the bidding credit; and

(E) For a transfer in year 6 or thereafter, there will be no payment.

(ii) These payments will have to be paid to the United States Treasury as a condition of approval of the assignment, transfer, ownership change or reportable eligibility event (see § 1.2114).

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47 C.F.R. § 1.2112
Ownership disclosure requirements for applications

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(b) Designated entity status. In addition to the information required under paragraph (a) of this section, each applicant claiming eligibility for small business provisions or a rural service provider bidding credit shall disclose the following:

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(2) As an exhibit to its application for a license, authorization, assignment, or transfer of control:

(i) List the names, addresses, and citizenship of all officers, directors, and other controlling interests of the applicant, as described in § 1.2110;

(ii) List any FCC–regulated entity or applicant for an FCC license, in which any controlling interest of the applicant owns a 10 percent or greater interest or a total of 10 percent or more of any class of stock, warrants, options or debt securities. This list must include a description of each such entity's principal business and a description of each such entity's relationship to the applicant;

(iii) List and summarize all agreements or instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility as a small business under the applicable designated entity provisions, including the establishment of de facto or de jure control. Such agreements and instruments include articles of incorporation and by-laws, partnership agreements, shareholder agreements, voting or other trust agreements, management agreements, franchise agreements, spectrum leasing arrangements, spectrum resale (including wholesale) arrangements, and any other relevant agreements (including letters of intent), oral or written;

(iv) List and summarize any investor protection agreements, including rights of first refusal, supermajority clauses, options, veto rights, and rights to hire and fire employees and to appoint members to boards of directors or management committees;

(v) List separately and in the aggregate the gross revenues, computed in accordance with § 1.2110, for each of the following: the applicant, its affiliates, its controlling interests, and affiliates of its controlling interests; and if a consortium of small businesses, the members comprising the consortium;

(vi) List and summarize, if seeking the exemption for rural telephone cooperatives pursuant to § 1.2110, all documentation to establish eligibility pursuant to the factors listed under § 1.2110(b)(4)(iii)(A).

(vii) List and summarize any agreements in which the applicant has entered into arrangements for the use of any of the spectrum capacity of the license that is the subject of the application; and

(viii) If claiming eligibility for a rural service provider bidding credit, provide all information to demonstrate that the applicant meets the criteria for such credit as set forth in § 1.2110(f)(4).